



Special investment contract under new rules (SPIC 1.1)

FEBRUARY 2018

VEGAS LEX

Just before New Year's the Government of the Russian Federation changed the rules for concluding special investment contracts (SPIC)¹. The new rules are meant to improve the SPIC mechanism taking into account its previous application. The amendments will come into force on June 18, 2018 but given the duration of investment planning and the procedure of concluding the contract, it would be useful to know about these changes now.

The revised rules set out the requirements to investments, the investor and contractors, as well as the documents the investor will need to conclude the contract in more detail. In addition, the order and the term for reviewing an investor's application have been defined, and the procedure for amending and terminating a SPIC was determined. Taking into account the amendments and the practice of concluding SPICs, the standard contract form was updated. Let's look at the major and expected changes in more detail.

Investments before concluding the contract

According to the new rules, the contract may be concluded for an investment project that has already been launched. It is sufficient that the project be implemented in the calendar year in which the investor submitted the application to conclude a SPIC. And the funds that have been invested prior to concluding the contract shall be treated as expenditure under a given project.

The investor's right to conclude a SPIC for a new phase of a project already under way, even if this project was launched long be-

fore the contract was concluded, has also been prescribed. The new phase should not be implemented prior to the calendar year in which the investor submitted the application. But this is not the only condition that will need to be met.

A separate business plan which provides for additional investment in the amount exceeding the standard "entry threshold" for concluding a SPIC will need to be drawn up for the new phase. And investment in the new phase should constitute at least 50% of the total investment in the project.

Previously, investment made in the project prior to concluding the contract was not taken into consideration. Investors also questioned whether or not a SPIC could be concluded for an additional phase of a project already launched.

Overall, the amendments are consistent with the market needs. You are now able to start a project without waiting for the investor's application to be reviewed. In addition, the investor is now able to continue with a project under way when a new phase is launched, what could have otherwise led to major financial costs.

Contract term, investment amount and composition

The SPIC term hasn't changed despite the instruction given by the president of Russia as per the results of the St. Petersburg International Economic Forum². It still constitutes 10 years. This term cannot be increased, however, by amending the rules for concluding a SPIC only. The federal law would need to be amended³.

¹ See Decree of the Government of the Russian Federation No. 1564 "On the introduction of amendments to some acts of the Government of the Russian Federation on issues related to a special investment contract" of December 16, 2017.

² The instruction to increase the term of a SPIC was published on June 14, 2017 on the website of the president of Russia – <http://www.kremlin.ru>.

³ See Article 16, Part 4 of Federal Law No. 488-FZ "On industrial policy in the Russian Federation" of December 31, 2014.

The investor still has to invest at least 750 million Russian roubles (without VAT)⁴ in the project. However, according to the new rules, a different investment amount may be stipulated by statutes and regulations of the Russian Federation.

One of the long-awaited novelties is that expenses for research, development and engineering works, clinical trials now fall under planned expenditure under a specific project. Expenses related to acquiring exclusive rights to intellectual property and rights to use intellectual property, rights to design and engineering documentation are now considered as project investment as well. However, total expenses in both of these domains should not exceed 25 % of total planned expenditure.

The amendments left the hotly debated problem related to SPIC indicators being measured in value terms only untouched. When discussing the new rules, business leaders proposed to allow the private party to calculate the amount of goods produced and sold in volume terms. In our opinion, the existing regulation cannot be called well-balanced. It can scare away potential investors and have them assume risks which they do not control.

Requirements to the contract's private party

The list of requirements to the investor and the contractors hired by the former to implement the project has been extended and became more stringent.

Entrepreneurs and companies registered in a state or on territories from the approved list of offshore zones⁵ cannot be SPIC participants. The same restriction applies to cases where organizations exercising con-

trol over the investor's company are registered in an offshore zone. Without a doubt this new rule is aimed at increasing transparency of the Russian economy and combatting tax evasion, which fall in line within the national deoffshorization campaign.

In the beginning, the authors of amendments wanted the restriction to apply to any "low-tax jurisdiction". However, in the end they relied on the business community and instead of using an ambiguous term decided to introduce a list of offshore zones. The replacement of the term merits approval because now one can identify specific states and territories which fall under this restriction.

Another novelty is that neither the investor nor the contractors should be in the process of reorganization on the date of the decision of the Interdepartmental Commission with regard to concluding the contract. The rules do not allow any form or reorganization.

Changes have also affected the composition of the SPIC private party. The investor can now procure the services of not only the manufacturer of goods, but the engineering center, the distributor of goods, the financial center and other parties as well (it's an open-ended list). However, the rules establish functions and responsibilities with respect to an industrial enterprise only. The nuances of participation of other contractors shall be fully determined by the contract participants themselves.

Contract sphere of application

For some industry sectors the title of the standard SPIC form no longer comprises an exhaustive list of these sectors. This investment mechanism is no longer applied in in-

⁴ The Ministry of Finance of the Russian Federation has proposed to increase this threshold to 1 billion rubles, borrowed funds and profits from implementing the investment project not being included in this amount. These requirements are prescribed in the draft law on special investment contracts (SPIC 2.0) prepared by the Ministry.

⁵ The list of offshore zones has been approved by Order No. 108n "On the approval of the List of states and territories offering preferential tax treatment and (or) not stipulating disclosure and provision of information on financial operations (offshore zones)" of November 13, 2007 of the Ministry of Finance of the Russian Federation.

dustry in a narrow sense, but also in energy and agriculture.

The Government of the Russian Federation has established that the Ministry of Energy of the Russian Federation will conclude SPICs in the oil refining, gas processing, petrochemical, coal and electric power industry sectors, while the Ministry of Agriculture of Russia – in its sphere.

Set of documents to be submitted with the investor's application

The list of documents to be submitted together with the application to conclude a SPIC has been extended.

The project implementation schedule, a table showing the financial resources secured for the project, indicating the sources providing these funds, as well as the investment schedule need to be presented as separate documents. The Ministry of Industry and Trade of the Russian Federation requested this information before as well.

In addition to the above, the investor should also present a certificate with detailed information about the structure of project participants, including parties that have an interest in implementing the investment project but who are not the investor or contractors⁶.

A certificate of the investor's and contractors' compliance with the requirements of the SPIC rules should also be submitted with the application. Essentially, the certificate presents warranties and representations (Article 431.2 of the Civil Code of the Russian Federation). Hence, if this document contains a misrepresentation, this may lead to withdrawal of the public party

(the government) from the contract and the need to pay damages.

The order of reviewing the investor's application

If the documents are submitted correctly, the authorized agency will send them to the Interdepartmental Commission together with a draft decision regarding the possibility of concluding the contract and a draft of the contract itself. If the documents submitted by the investor do not comply with the requirements, the agency will return them to the applicant, explaining which requirements the applicant failed to comply with.

There is now another reason the investor might refuse to conclude the contract. The investor is no longer able to use the SPIC mechanism if the amount of investment in the project is less than the amount allocated from the state budget towards investor preferences.

The total period from the date the application to conclude a SPIC is submitted to the date when the approved contract draft is sent to the investor has increased and now constitutes up to 90 business days. If before the authorized agency sent the decision of the Interdepartmental Commission to the investor within 10 business days from the date of its receipt, now this procedure will require up to 15 business days from the date the Commission makes its decision. Previously, if the decision of the Commission was positive, the investor received the decision and the SPIC draft for signing, now, according to the new rules, the contract draft is sent within 30 business days from the date of the Commission meeting.

⁶ Project participants can include other interested parties, i.e. parties that are entitled to 20 % of the investor's (contractors') net profit and (or) which provide more than 20 % of the total amount of funds to finance the project (except financial organizations, development institutions), as well as major suppliers of materials and parts needed to manufacture the goods, or the buyers of goods to be sold once the project is completed (if these suppliers and (or) buyers are known on the date of submission of the application to conclude a SPIC).

The procedure and grounds for amendment, termination of the contract

To change the conditions of a SPIC, the investor should submit the corresponding application to the authorized agency. The investor will need to justify the need for changes, prepare a draft of the agreement on the introduction of changes to the contract and a progress report for the existing contract. The authorized agency will review the investor's request within 30 business days and prepare a draft of the decision on the possibility of changes, after which the documents will be sent to the Interdepartmental Commission.

The Commission will review the application requesting a change in the conditions and will sign the agreement on the introduction of amendments to the contract concluded in the order and term provided for concluding a contract.

Both, the investor and the Russian Federation can initiate termination of the investment contract. In both cases, the decision as to expediency of this termination is made by the Interdepartmental Commis-

sion. The request for termination of a SPIC with the documents enclosed is sent to the Commission by the authorized agency. There is no set time period within which the authorized agency must send the documents to the Commission.

The Commission shall review the documents submitted within 30 business days from the date of their shipment by the authorized agency to the Interdepartmental Commission. Its decision will serve as grounds for signing the contract termination agreement or bringing a claim before the court.

The updated standard SPIC form also establishes the maximum acceptable deviation of contract performance indicators, thus introducing more clarity to the relations between the parties. The investor and contractors should be aware of the fact that should these indicators deviate by more than 20% based on year-end results, this will lead to amendment or termination of the contract. The SPIC form used previously did not specify such deviation thresholds. At the same time, contract participants often found it difficult to reach a balance between private and public interests in this matter.

Contacts



MAXIM GRIGORYEV

Partner, Head of special projects

grigoryev@vegaslex.ru



ALEXANDRA VASYUKHNOVA

Partner, Head of Technology and Investment group

vasukhnova@vegaslex.ru



NATALIA ABTSESHKO

Head of International projects group

abtseshko@vegaslex.ru



ARTEM GASPARYAN

Junior Associate
Southern directorate

gasparyan@vegaslex.ru

For further information on the services of VEGAS LEX, please visit our website www.vegaslex.ru.
This publication serves informational purposes only and it cannot be used as professional advice. VEGAS LEX bears no responsibility for use of all or some of the recommendations contained in this publication.